IN THE SEYCHELLES COURT OF APPEAL
Civil Appeal No. 1 of 1992

Expedit Abel — Appellant

VERSUS

Herbert Echiler — Respondent

Mr Derqcues for Appellant
Respondent absent and unrepresented

Judgement of Silungwe, J.A.

The appellant - a Seychelois - sued the respondent - a German - before the Supreme Court for an alleged breach of a partnership agreement and claimed R600,000 as damages.

The respondent, who had since returned to his home in Germany, was duly served there with an amended plaint dated June 11, 1991. The respondent's letters of August 28, 1990 and July 10, 1991, together with the letters annexures, were subsequently treated by the trial court as a statement of defence; these letters contained a summary of the material facts upon which the respondent relied, though they were not, and could not, be treated as evidence.

The Supreme Court, therefore, heard the case in the absence of the respondent or legal representative. On hearing the case for the appellant, Perera, J., dismissed the action.

Briefly, the facts of the case show that there was an agreement dated November 16, 1984, between the respondent and the Government of Seychelles under which the respondent was authorised to prospect for, and recover, the treasure within three years, extendable by mutual agreement for a further period of one year. The respondent was required to give to the Government a notice of commencement of work and to complete excavation within three months of such notice.

On November 30, 1984, the appellant entered into a partnership agreement with the respondent to jointly search for the "Oliver Le Vasseur Treasure" believed to have been concealed in Seychelles by some pirates. At the trial, the appellant testified that he had been associated with the treasure hunt since 1955. He said that he had spent some 26 years decoding the cryptogram and, for this purpose, he had researched at archives; obtained copies of relevant documents; and bought reference books such as the Crapicle of Solomon and the Dictionary of symbols in French. All these things were done so as to facilitate and aid the location of the hidden treasure, believed be one of the biggest in the world.

The November 30, 1984 agreement provided inter alia, that -

1. the appellant was to put his knowledge and his means concerning knowledge and documents at the respondent's disposal;

2. the respondent on his part was to "finance the said treasure hunt" and to attend to the necessary formalities and negotiations with the Government;

3. the appellant was to receive half of all monies upon the successful recovery of the treasure, after payment to the Government and that

4. the parties were to work exclusively together and no information of this project (was) to be made known to any other party.

All the formalities required by the agreement were performed by the respondent and the prospecting commenced on August 15, 1986. Three days later, the workers found a sealed areas consisting of hard corals which, according to the appellant's testimony, were in a state of unnatural formation and, thererfore, man-made. He was thus satisfied that he was on the right path to the hidden treasure. The record of appeal, however, shows that when the respondent, Dr. Selywn Gendron, a molecular physicist attached to the Government of Seychelles, Mr. Khanna, a geologist and Mr. Pat Lablache, the Director General of the Lands Division, examined the corals at the excavation site, they were all of the opinion

Clause 9 (1) of the November 16, 1984 agreement between the respondent and the Government of Seychelles relevant to this case, stipulates that -

> " 9 (1) if at any time the prospector considers that treasure can be recovered or that no further treasure can be recovered, he shall so notify the Government."

The respondent was a prospector. According to a copy of a letter produced by the appellant and dated August 19, 1986 (Exhibit P.17) which the respondent addressed to the Acting Chief Lands Officer, the respondent gave notice to cease all excavation work in terms of Clause 9 (1) of the agreement already referred to above. The respondent's letter reads (in part) as follows:

> "I wish to say that I have began the search but did not find some man-made materials which I had expected to find in this area to enable me to proceed further.... Under these circumstances, I wish to inform you that I can no longer pursue with the agreement."

The learned trial judge found that the respondent had satisfied the conditions of his agreement and that the notice of August 19, 1986 (Exhibit P.17) had properly been sent in terms of Clause 9 (1), not Clause 18 (1), of the agreement.

It is argued before us by Mr. Derjacques, on behalf of the appellant, that as the partnership agreement between his client and the respondent contained no termination clause, it was terminable in terms of Article 1869 of the Civil Code of Seychelles and was not subject to the terms of the agreement between the respondent and the Government. He further submits that the notice given to the Government by the respondent was not good notice in terms of Article 1869 because it was malafide and inopportune.

In my considered opinion, the notice given to the Government by the respondent was in conformity with their agreement of November 16, 1984 and, therefore, proper and lawful. The question that needs to be answered is whether the partnership agreement here was either frustrated or subject to the agreement between the respondent and the Government of both.

Clearly, the object of the agreements between the Government and the respondent on the one hand and between the appellant and the respondent on the other, was the recovery of the treasure. It is further evident that if the respodent became satisfied, as he in fact did, that there were no prospects of recovering the treasure, he was entitled to give due notice to the Government to that effect and to terminate his contract with the Government. As the recovery of the treasure was the basis of, and therefore, central to, the respondent's agreements with the Government and the appellant, respectively, a factual realisation by the respondent, fortified as it was by expert opinion, that the sealed area at the excavation site consisted of hard corals in their natural formations and that, as such, the treasure could not possibly be recovered, entitled the respondent to treat his contract with the appellant as at an end. In other words, the contract between the respondent and the appellant was frustrated. In any event, the respondent's lawful termination of his agreement with the Government went to the root of his partnership agreement with the appellant which thus became a mere shell, devoid of any substance. It follows that the respondent's termination of the partnership agreement was justified, in good faith and opportune. In the circumstances, the appellant has no entitlement whatsover to any damages.

I would have no hesitation in dismissing the appeal. But no order would be made as to costs since the respondent did not defend his action at the trial stage or fight the appeal, either in person or by his legal representative.

Anne M. Silungwe
Justice of appeal

IN THE SEYCHELLES COURT OF APPEAL

Civil Appeal No.1 of 1992

Expedit Abel — APPELLANT

versus

Herbert Echtler — RESPONDENT

Derjacques for appellant
Respondent absent and unrepresented

Judgment of Mustafa P.

Expedit Abel the appellant had filed an action in the Supreme Court against Herbert Echtler, the respondent herein, claiming Rs.600,000 as damages for breach of a partnership agreement. This suit was filed after an earlier action entered by the appellant against the respondent was aborted. The case came before Pereira J who dismissed the appellant's claim. The appellant is appealing from that decision.

At the trial the respondent did not appear and was not represented. He sent a letter to the Court which was treated as something in the nature of a statement of defence. The only effect of that letter is that it is a denial of the appellant's claim. Apart from that it does not have any probative value.

The following facts emerged solely from the evidence adduced by the appellant and his witnesses who testified at the trial. Nobody testified on the side of the respondent.

The appellant is a Seychellois and had since 1955 been interested in searching for the "Olivier le Vasseur Treasure," believed to have been hidden by some pirates in Seychelles. He stated that he had decoded the relevant crytogram, done research, studied documents and reference books, such as the Crapicle of Solomon and the Dictionary of Symbols in French, concerning the site of the hidden treasure. He had no financial resources to mount the search by himself. The respondent, a German national, while visiting Seychelles, met up with the appellant. The respondent was also interested in the Vasseur treasure. The appellant told the respondent that he could discover the treasure from what he had learned during his years of study.

As a result the appellant approached the Seychelles Government and entered into an agreement with the said Government on 16th November, 1984. That agreement contains provisions which give the respondent sole and exclusive right to prospect for and recover the Vasseur treasure within a period of 3 years from the date of the agreement. The actual period allowed for excavation was 6 weeks during the 3 year term. The respondent had express permission to take the appellant into partnership in carrying out the excavation in terms of the agreement.

Consequent on that the appellant entered into an agreement with the respondent dated 30th November, 1984. That agreement contains inter alia, the following provisions.

(a) the appellant puts all his know how at the respondent's disposal, while the respondent finances the treasure hunt and undertakes all negotiations with the Seychelles Government,

(b) the appellant will have the right to enforce the conditions in the agreement made between the appellant and the Seychelles Government. The appellant and the respondent are to share equally in the proceeds of the recovered treasure.

The excavation and prospecting commenced on 15th August 1986. Three days later, the workers reached a sealed area consisting of hard corals. That was supposed to be the crucial and focal point. The appellant was of the view that the sealed area was man - made, not a natural formation, and will open up to the passage leading to the hidden treasure. The respondent visited the site. Three experts Dr. Gendron, a molecular physicist, Mr Khanna a geologist and Mr. Lablache, Director General of Lands Division also did so. These three persons scrutinised and examined the corals and were satisfied that they were corals in their natural formation, not man made or arranged at all. Thereupon the respondent stopped all prospecting work and paid off the labour. It was done in the

presence of the appellant. On the following day, 19th August, the respondent wrote and teminated his contract with the Seychelles Government, copied to the appellant, citing as one of the reasons for termination the fact that the so called entrance to the passage to the treasure was not man made but a natural coral formation.

The trial judge in a long judgment, dealt with all aspects of the appellant's claim. He was satisfied that the respondent rightly believed that no treasure could be found and was entitled to terminate his contract with the Government. He held that the appellant had failed to establish that the respondent had committed a breach of his agreement with the appellant by failing to finance the treasure hunt in the circumstances. He also held the appellant had failed to prove he had suffered damages.

In the appeal before us Mr. Derjacques for the appellant submitted two points in argument. He contended that the respondent had breached his agreement with the appellant to finance the tresure hunt. He submitted that the excavation ceased after 3 days of work. He said the respondent should have continued with the excavation, even if he had terminated his contract with the Government. He said this is because the obligations between the appellant and the respondent subsisted even if the basis of the agreement i.e. the contract with the Government had disappeared. His argument is that such agreement has the force of law between the parties, citing in support Article 1134 of the Civil Code. He

also contended that the agreement between the appellant and respondent contains no termination clause and that Article 1869 of the Civil Code would apply.

I am not persuaded by Mr. Derjacques's submissions. The agreement between the appellant and the respondent was based wholly on the contract entered into between the respondent and the Government. Once that contract was terminated, no prospecting or excavation could be carried out. The appellant was convinced that the formation at the site in question was man made, but the appellant was justified to disagree and accept the professional opinions of three independent experts. It is futile to expect the respondent, after that examination, to pour out more money in further prospecting. Although there was no termination clause in the agreement between the appellant and respondent, there was one in the contract between the respondent and the Government.

In any event, the underlying objective of the agreement, to hunt for the Vassuer treasure, was totally frustrated when the sealed site was found to be corals of natural formation. To any ordinary reasonable individual, it would be futile to continue excavating in the circumstances. The appellant was apprised of the respondent's action of termination and also again by copy of a letter. The dissolution of the agreement between the appellant and the respondent was justified, made in good faith and in an

opportune moment, to quote from Article 1869. The question of damages cannot arise.

I would dismiss the appeal. As the other party has not appeared, I would make no order as to costs.

A. Mustafa

A. Mustafa

President.

Judgment delivered in the presence of counsel for the Appellant

Dated this 31st day of March 1993

A. A. Mustafa

JUDGE

In the Seychelles Court of Appeal

Expedit Abel — Appellant

v/s

Herbert Echiler — Respondent

Civ. Appeal 1/92

Judgment of Goburdhun J.A

I have had the advantage of reading the judgment in draft of the President. I agree with his reasoning and conclusion. The judgment of the learned trial judge is sound both in law and on fact. The appeal is of no merit and I would dismiss it. I would make no order as to costs.

H Goburdhun

Justice of Appeal

Judgment delivered in the presence of counsel for the Appellant

Dated this 31st day of March 1993.

A. R. Ibrahim

Judge